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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No.

BAUMER FOODS, INC., *a corporation,*
Petitioner,

vs.

G. I. GRIFFITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Baumer Foods, Inc., a Louisiana corporation, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the

Ninth Circuit entered in the above named cause on the 2nd day of March, 1948, affirming a final judgment of the United States District Court for the Western District of Washington, Southern Division.

JURISDICTION

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. 347 (a).

SUMMARY STATEMENT OF MATTERS INVOLVED

There is here presented the converse of the circumstances in *Giles v. Vette,* 263 U. S. 553. This partnership was in existence for three years prior to the effective date of the Uniform Act in the State of Washington, while in *Giles v. Vette,* 263 U. S. 553, the partnership was formed after the repeal of the original act and after the effective date of the Uniform Act.

The petitioner, Baumer Foods, Inc., a Louisiana corporation, sued the respondent, G. I. Griffith, and H. H. Huber and Harold Schmitt, copartners doing business under the firm name and style of Midfield Packers, all residents of Olympia, Washington, in the United States District Court for the Western District of Washington, Southern Division, for the purchase price of a quantity

of apricot puree purchased by the petitioner from the Midfield Packers which was condemned and destroyed pursuant to the Federal Food, Drug and Cosmetic Act.

Huber and Schmitt confessed judgment in writing upon which judgment was rendered (R., p. 23) but the action was dismissed as to the respondent Griffith because the court held him to be a limited partner (R., p. 22). There is no dispute of fact.

The original articles of limited partnership (R., pp. 71 to 74) were executed August 14, 1942, and recorded December 8, 1942. A partnership of three general partners and three limited partners, one of which was the respondent Griffith, was organized and the articles specifically provided that the original Limited Partnership Act of the State of Washington should govern.

The court found (Finding No. VIII, R., p. 19) that at all times since December 8, 1942, and at all times material, said partnership had been in existence doing business in Olympia, Washington. The articles were modified February 11, 1944 and recorded April 3, 1944 (R., p. 74), at which time some founders dropped out but Huber and Schmitt continued as general partners and respondent Griffith as the sole limited partner, and the court found in Finding No. IX (R., pp. 19, 20) that since April 3, 1944,

and at all times material to this action this limited partnership was in active business.

The original Limited Partnership Act of the State of Washington was enacted in 1869 (Rem. Rev. Stat., Sec. 9966 to 9975). The State of Washington in 1945 adopted the Uniform Limited Partnership Act which became effective June 8 of that year (Chap. 92, Laws of the State of Washington 1945).

The learned District Court (R., p. 67) said unequivocally that under the old law he would have no difficulty whatever in finding that Griffith was a general partner.

This partnership was in continuous existence for three years prior to the effective date of the Uniform Act, and whereas Sec. 30 of the Uniform Act continues the old law in force as to existing partnerships the District Court, nevertheless, felt itself bound by certain language in *Giles v. Vette,* 263 U. S. 553, which petitioner asserts to be dicta, to hold that Sec. 30 of the Uniform Act did not apply and that Griffith was a limited partner.

Petitioner appealed from the final judgment to the Circuit Court of Appeals for the Ninth Circuit. On March 2, 1948, the court filed its judgment affirming the judgment of the District Court (R., p. 97.)

STATUTES

Paragraph (2) of Section 30, Chapter 92, Washington Session Laws of 1945, page 258:

> "A limited partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of sections 9966 to 9975, inclusive, Remington's Revised Statutes, except that such partnership shall not be renewed unless so provided in the original agreement." (Rem. Supp. 1945, Sec. 9975-30).

The sections so continued in force are in part as follows:

> "Limited partnership for the transaction of mercantile, mechanical, or manufacturing business may be formed within this state, by two or more persons, upon the terms and subject to the conditions contained in this chapter." (Sec. 9966, Rem. Rev. Stat.)

> "A limited partnership may consist of two or more persons, who are known and called general partners, and are jointly liable as general partners now are by law, and of two or more persons *who shall contribute to the common stock a specific sum in actual money as capital,* and are known and called special partners, and are not personally liable for any of the debts of the partnership, except as in this chapter specially provided." (Sec. 9967, Rem. Rev. Stat.) (Emphasis supplied.)

> "* * * The partners shall, for four consecutive weeks immediately after the filing of the certificate

of partnership, publish a copy of the same in some weekly newspaper published in the county where the principal place of business of the partnership is, or if no such paper be published therein, *then in some newspaper in general circulation therein, and until such publication is made and completed, the partnership is to be deemed general.*" (Sec. 9969, Rem. Rev. Stat.) (Emphasis supplied.)

QUESTION PRESENTED

Does this court's decision in *Giles v. Vette*, 263 U. S. 553, mean that Sec. 11 of the Uniform Limited Partnership Act applies to existing limited partnerships when Sec. 30 of the Uniform Limited Partnership Act explicitly continues the prior statutes in force as to existing limited partnerships?

REASONS RELIED UPON FOR GRANTING THE WRIT

Giles v. Vette, 263 U. S. 553, was the basis of the decision of both the District Court and the Circuit Court of Appeals. The opinion below is only two lines (R., p. 96):

> "The judgment of the District Court is affirmed upon the authority of Giles v. Vette, 263 U. S. 553."

Petitioner urged that the judgments below are in conflict with the opinion of this court in *Giles v. Vette*, 263

U. S. 553, and that both courts below misconstrued this court's decision in that case by applying language used in that opinion to the opposite circumstances presented here.

CONFLICT WITH GILES v. VETTE

There is a direct conflict in the judgments below and this court's decision in *Giles v. Vette,* 263 U. S. 553. Section 725, Title 28, U. S. C., provides that the laws of the several states shall control in common law actions.

Section 30 of the Uniform Limited Partnership Act continues the old law in force as to existing limited partnerships. The sections so continued in force are found in the petition (ante, p. 7..). The District Court found that this partnership had been in continuous existence for three years prior to the effective date of the Uniform Act (R., pp. 19, 20). The courts below refused to apply the statutes so continued in force as to existing partnerships. Such action, therefore, is in direct conflict with the statement in *Giles v. Vette,* 263 U. S. 553, 562, that under the old law "the statute authorizing limited partnerships must be complied with, or all those who associated under it would be liable as general partners."

Respondent's position at the trial was tantamount to admitting that under the old law respondent Griffith would be a general partner (R., p. 57). The learned District Judge said that under the old law he would be a general partner (R., p. 67). If the original act applies then the Findings make the respondent Griffith a general partner.

GILES v. VETTE MISINTERPRETED

The statement in *Giles v. Vette*, 263 U. S. 553, that Sec. 11 covered all cases where one had contributed capital to the business conducted by a partnership believing himself to be a limited partner was unnecessary to the decision and does not apply to existing limited partnerships because that is covered by Sec. 30 of the Uniform Limited Partnership Act. At all events, the courts below have misconstrued the effect of that statement because it is to be limited to the facts there presented for decision.

That is, in *Giles v. Vette*, 263 U. S. 553, the court was dealing with a partnership organized after the repeal of the original statute and was not concerned with an existing partnership, and the language is not to be extended to a case in which there is presented for

determination the liability of a partnership existing when the Uniform Act became applicable. On the other hand, it is here admitted and the court found (R. pp. 19, 20) that this partnership was in continuous existence for three years prior to the effective date of the Uniform Act and as to all existing limited partnerships the old law is continued in force.

Both courts below thought that *Giles v. Vette*, 263 U. S. 553, prevented them from applying the original statute. Moreover, the learned District Court asserted that this court's decision on the interpretation of a state statute was binding upon all courts, state and federal (R., p. 68).

IMPORTANCE

Giles v. Vette, 263 U. S. 553, was a bankruptcy case, and the point is most likely to recur in bankruptcy cases. Thirty states have now adopted the Uniform Limited Partnership Act. Consequently, the question is nationally important.

It is therefore respectfully submitted that this petition should be granted.

HARRY ELLSWORTH FOSTER
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The findings of Fact and Conclusions of Law of the District Court appear at Record, pp. 15 to 23, and its unreported opinion is found in the Record, (pp. 67 to 70). The opinion of the Circuit Court of Appeals is yet unreported but appears in the Record (p. 96). It is:

> "The judgment of the District Court is affirmed upon the authority of Giles v. Vette, 263 U. S. 553."

JURISDICTION

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code (28 U. S. C. 347(a).

STATEMENT OF THE CASE

There are no controverted issues of fact. The summary statement of the matters involved in the petition for a writ of certiorari is adequate.

ERRORS RELIED UPON

The Circuit Court of Appeals erred in holding that the decision of this court in *Giles v. Vette*, 263 U. S. 553, applied to the respondent's partnership, which existed

upon the effective date of the Uniform Limited Partnership Act in the State of Washington, because Sec. 30 of that act expressly continues the old law in force as to existing limited partnerships and under the old law respondent Griffith is a general partner.

SUMMARY OF ARGUMENT

The proper construction of *Giles v. Vette*, 263 U. S. 553, is the question here presented, for it is the sole basis for decision by both the Circuit Court of Appeals and the District Court. Petitioner urges that both courts below misconceived the effect of that decision. The argument may be divided into two portions:

1. In *Giles v. Vette*, 263 U. S. 553, the court was dealing with a partnership which was organized after the repeal of the original act and after the effective date of the Uniform Act. Consequently, the expressions used in that opinion are limited in application to the facts there considered.

2. The decisions below are in conflict with *Giles v. Vette*, 263 U. S. 553, because the court there announced that under the prior law all persons associating in a partnership were general partners unless the statutes respecting limited partnerships were complied with. The court expressly found that this was an existing limited

partnership, and that the provisions of the old statute respecting limited partnerships had not been complied with, and Sec. 30 of the Uniform Act expressly continues the old law in force as to existing partnerships.

JUDGMENTS BELOW ARE IN CONFLICT WITH GILES v. VETTE

in *Giles v. Vette*, 263 U. S. 553, 562, it is said:

> "Prior to the taking effect of that act, the courts of Illinois held that, at common law, all partners were liable without limitation for the debts of the firm, and that, in order to limit such liability, the statute authorizing limited partnerships must be complied with, or all those who associated under it would be liable as general partners. Henkel v. Heyman, 91 Ill. 96, 101; Manhattan Brass Co. v. Allin, 35 Ill. App. 336, 341; Walker v. Wood, 69 Ill. App. 542, 549, affirmed in 170 Ill. 463, 48 N. E. 919; Cummings v. Hayes, 100 Ill. App. 347, 353. And this is in harmony with decisions elsewhere under statutes similar to the Illinois Act of 1874. [1] * * *"

> "[1]Pierce v. Bryant, 5 Allen, 91, 94; Haggerty v. Foster, 103 Mass. 17; Argall v. Smith, 3 Denio, 435, affirming 6 Hill, 479, 481; Durant v. Abendroth, 69 N. Y. 148, 152, 25 Am. Rep. 158; Re Merrill, 12 Blatchf. 221, 223, Fed. Cas. No. 9,467; Richardson v. Hogg, 38 Pa. 153; Vanhorn v. Corcoran, 127 Pa. 255, 268, 4 L.R.A. 386, 18 Atl, 6; Re Allen, 41 Minn. 430, 43 N. W. 382; Lineweaver v. Slagle, 64 Md. 465, 483, 54 Am. Rep. 775, 2 Atl. 693; Holliday v. Union Bag &

Paper Co., 3 Colo. 342, 344; R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 776, 72 S. E. 672, Ann. Cas. 1913B, 913."

Section 30 of the Uniform Limited Partnership Act continues the old law in force as to existing limited partnerships, and the District Court found upon admissions or undisputed evidence that this partnership had been in continuous existence for three years prior to the effective date of the Uniform Act (R., pp. 19,20). The District Court, however, refused to apply the rule laid down by the existing statutes although he announced (R., p. 67) that if the old law applied he would have no difficulty in holding the respondent Griffith to be a general partner:

> "Were this a matter of first impression and there were no guides to be followed as precedents, under the admitted facts here and of many constructions placed upon the old law, before the enactment of the uniform partnership act of 1945 by the legislature of this state, I would have no difficulty whatever in finding, as to creditors such as we have in the instant case, the liability of the defendant Griffith would be that of a general partner. He doubtless thought, and intended to become liable only as a limited partner. There were a number of things he did not do, to protect himself in that regard, all of which when taken together would deny him the benefit of limited partnership liability."

SECTION 30 ELIMINATED ENTIRELY

Section 30 manifests an unmistakable legislative intent to continue the old law in force as to existing limited partnerships unless and until such institutions qualify under the new act, and the court found that there was no attempt to qualify under the new act (R., p. 21). The construction of *Giles v. Vette*, 263 U. S. 553, by both courts eliminates Sec. 30 completely.

GILES v. VETTE MISINTERPRETED

In *Giles v. Vette*, 263 U. S. 553, 563, it is said:

> "Section 11 is broad and highly remedial. The existence of a partnership—limited or general—is not essential in order that it shall apply. The language is comprehensive and covers all cases where one has contributed to the capital of a business conducted by a partnership or person, erroneously believing that he is a limited partner. It ought to be construed liberally, and with appropriate regard for the legislative purpose to relieve from the strictness of the earlier statutes and decisions. See Logan v. Davis, 233 U. S. 613, 627, 628, 58 L. ed. 1121, 1128, 34 Sup. Ct. Rep. 685; United States v. Colorado Anthracite Co., 225 U. S. 219, 223, 56 L. ed. 1063, 1064, 32 Sup. Ct. Rep. 617; United States v. Southern P. R. Co., 184 U. S. 49, 56, 46 L. ed. 425, 429, 22 Sup. Ct. Rep. 285. Its application should not be restricted to cases where there was an attempt to organize a limited partnership under that act."

That language was unnecessary to the decision because

the court was there dealing with a partnership organized after the original law had been repealed and the Uniform Act substituted in its place. Of that fact the court's opinion leaves no doubt, for on page 559 it is said:

> "* * *The first effort to form a limited partnership was given up. The final effort failed because the certificate was not filed until after the repeal of the Act of 1874. * * *"

and on page 564:

> "* * *But the Act of 1874 was repealed and the Uniform Limited Partnership Act was substituted for it before the certificate was filed and before the firm commenced business. * * *"

On the other hand, the Findings in this case (R., pp. 19, 20) upon admissions or undisputed evidence show that this partnership was in continuous existence for three years prior to the effective date of the Uniform Act. Consequently, under the express provisions of Sec. 30 the old statutes are continued in force and the respondent Griffith is a general partner. The quoted language from this court's opinion as applied to the circumstances in this case from the judgments in the courts below calls for the frequently applied rule originally announced in *Cohens v. Virginia*, 6 Wheaton 264 399, 5 L. ed. 257, as follows:

> "It is a maxim not to be disregarded, that

> general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Only recently in *Armour & Co. v. Wantock*, 323 U. S. 126, 132, it was again said:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion."

The true construction of *Giles v. Vette*, 263 U. S. 553, is that all limited partnerships organized after the effective date of the Uniform Act and after the repeal of the original Partnership Act are controlled by the Uniform Act. On the other hand, the Uniform Act has no application to partnerships in existence when the Uniform Act became effective, because Sec. 30 of the Uniform Act declares that the old law shall control as to partnerships organized under a prior law.

Respectfully submitted,

HARRY ELLSWORTH FOSTER,
Attorney for Petitioner.

Olympia, Washington, April 12, 1948.